

No.

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IN THE WASHINGTON STATE COURT OF APPEALS DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

MARK J. GOSSETT

Appellant.

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APPEAL FROM THE SUPERIOR COURT

OF THURSTON COUNTY

Cause No. 08-1-02102-9

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PERSONAL RESTRAINT PETITION

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## **Table of Contents**

TABLE OF AUTHORITIES.....	2
I. STATEMENT OF THE CASE .....	4
A. Procedural History.....	4
B. Facts .....	4
II. ARGUMENT .....	11
III. CONCLUSION .....	25

## TABLE OF AUTHORITIES

### Cases

<u>Darden v. Wainwright</u> , 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed. 2d 144 (1986).....	13
<u>Greer v. Miller</u> , 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed. 2d 618 (1987) .....	12
<u>In re Haverty</u> , 101 Wn.2d 498, 681 P.2d 835 (1984).....	21
<u>In re Pers. Restraint of Nichols</u> , 171 Wn.2d 370, 256 P.3d 1131 (2011).....	21
<u>In re Personal Restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835 (1994).....	21
<u>In the Matter of the Personal Restraint of Crace</u> , 174 Wn.2d 835, 280 P.3d 1102 (2012).....	12
<u>In the Matter of the Personal Restraint of Glasmann</u> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	12, 14
<u>In the Matter of the Personal Restraint of Maxfield</u> , 133 Wn.2d 332, 945 P.2d 196 (1997) .....	23
<u>In the Matter of the Personal Restraint of Monschke</u> , 160 Wn.App. 479, 251 P.3d 884 (2010) .....	11
<u>In the Matter of the Personal Restraint of Pirtle</u> , 136 Wn. 2d 467, 965 P. 2d 593 (1998) .....	11, 21
<u>In the Matter of the Personal Restraint of Taylor</u> , 105 Wn.2d 683, 717 P.2d 755 (1986) .....	21, 22
<u>State v. Ermert</u> , 94 Wn.2d 839, 621 P.2d 121 (1980) .....	17
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009) .....	14, 15, 16, 18, 20
<u>State v. Fuller</u> , 169 Wn.App. 797, 282 P.3d 126 (2012) .....	15
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	20
<u>State v. Humphries</u> , 170 Wn.App. 777, 285 P.3d 917 (2012).....	18
<u>State v. Johnson</u> , 158 Wn.App 677, 243 P.3d 936 (2010) .....	16, 20
<u>State v. Kilgore</u> , 147 Wn.2d 288, 53 P.3d 974 (2002) .....	18
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	23
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	13, 14
<u>State v. Saunders</u> , 91 Wn.App 575, 958 P.2d 364 (1998).....	18
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	16
<u>State v. Venegas</u> , 155 Wn.App. 507, 228 P.3d 813 (2010).....	16, 20
<u>State v. Walker</u> , 164 Wn.App. 724, 265 P.3d 191 (2011).....	16, 20
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	11, 16, 17
<u>Tower v. Glover</u> , 467 U.S. 914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984).....	17
<u>United States v. Cabrera</u> 222 F. 3d 590, 594 (9 <sup>th</sup> Cir. 2000).....	13, 14

### Rules

ER 404.....	6, 12, 14, 15, 17, 18, 22, 24
ER 608.....	6, 14, 17, 19, 22, 24

## **Constitutional Provisions**

Art. I, § 22 of the Washington Constitution .....	12, 23
Art.1 § 3 of the Washington Constitution .....	12
Fifth Amendment .....	12, 14
Fourteenth Amendment.....	12
Sixth Amendment.....	12, 16, 23

## **I. STATEMENT OF THE CASE**

### **A. Procedural History**

After being charged with two counts of rape of a child in the second degree, two counts of child molestation in the second degree, and a single count of intimidation of a witness, Mr. Gossett was found guilty of the first four counts. CP 160-63. The intimidation charge was severed from the first four counts. He was sentenced to 245 months in the Department of Corrections. CP 184-198.

After a timely notice of appeal was filed, his conviction was affirmed on March 3, 2012. The Supreme Court subsequently denied his petition for review on August 7, 2012.

### **B. Facts**

In June 2000, A.R.G. (dob 11/26/89) and her biological sister S.G. (dob 12/09/87), were placed as foster children in the home of Gossett and his wife Linda [RP 272-74, 343, 830, 896, 963, 966, 992], who adopted the children in December 2001. RP 78, 830, 992.

A.R.G. had difficulty adjusting to the Gossetts' strict rules and discipline and was frequently reprimanded up until she reached the 10<sup>th</sup> grade. RP 276-77, 279, 281, 304. In January 2008, during her senior year in high school, A.R.G., following an argument with her mother [RP 120, 144], moved out of the Gossetts' residence, and the following June made her initial allegations of sexual abuse, telling Jennifer Myrick and Roberta Vandervort that since the eighth grade she had been sexually molested by Gossett and that it had gotten progressively worse

over the years. RP 122, 125. It had started with uncomfortable hugging and French kissing before advancing to “oral sex and things of that nature.” RP 126.

About a month later, in July 2008, A.R.G. was interviewed by Deputy Kurt Rinkel [RP 73, 342, 356-57], and disclosed what she had told Myrick and Vandervort, indicating on three occasions that the sexual abuse happened when she was between age 14 and 18 and continued until January 2008. RP 369-70. Similarly, when A.R.G. spoke with Sergeant Evans that October, she told him on two occasions that Gossett had started sexually abusing her when she was 14 and in the eighth grade. RP 373-74.

At trial, while admitting she had told the investigating law enforcement officers at least five times that the sexual abuse had started after she turned 14 [RP 373], A.R.G. changed her story, saying that the abuse had started before she turned 14 [RP 314], again depicting how it had progressed from French kissing to the touching of her breasts to digital penetration of her vagina. RP 296, 299-300. “It would occur in the living room, in my bedroom, in the hallway, downstairs, on the tent - - in the tent, on the trampoline, everywhere.” RP 314. When asked why she never reported this behavior to her mom or anyone else, A.R.G. claimed that Gossett had told her that if she “ever told anybody, my life would be a living hell.” RP 366.

Gossett denied that he ever physically or sexually abused A.R.G. RP 883-84, 891. S.G., A.R.G.’s biological sister [RP 963], asserted that A.R.G. had trouble adapting to the Gossetts’ rules and required chores: “She was always pushing the limits to things, didn’t want to listen, didn’t want to be told to do

stuff.” RP 969. S.G. never observed anything in the way of inappropriate behavior between Gossett and A.R.G. and described her father as “(c)aring, sweet, soft, gentle. He never really yelled at anybody, just kind of goes with the flow with us.” RP 985. When A.R.G. contacted S.G. after leaving the family residence in January 2008, she never mentioned that she’s been sexually abused. RP 987.

Six other witnesses familiar with the Gossett household, including Gossett’s wife, Linda, echoed S.G.’s observations that there was never any indication of inappropriate behavior between Gossett and A.R.G. RP 850-851, 953, 1178-79, 1304, 1327, 1356. Linda Gossett confirmed that A.R.G. had struggled with the adoption process over the years [RP 1117], adding that A.R.G. “spent a good couple of years just being very belligerent. It was hard. I was intimidated by her a lot of times. I tried not to let that show.” RP 1122.

Prior to trial, the parties argued pretrial motions. There was a discussion regarding “404(b) evidence” with counsel stipulating that Mr. Gossett’s daughter could testify about prior physical abuse. RP 59:19 – RP 62:17. This included a prior conviction for Fourth Degree Assault to demonstrate that he was not a peaceful man. RP 60:12-23. There was no analysis conducted on the record to determine its relevance, its limitations, or whether its prejudicial value was outweighed by its prejudicial effect. Further, while the stipulation focused on alleged abuse inflicted by Mr. Gossett and Linda Gossett, the parties discussed the issue in the context of ER 404(b) and not ER 608, which should have been the rule applicable to Linda Gossett’s prior conduct.

Subsequently, the State repeatedly asked questions of the witnesses regarding the physical abuse allegedly inflicted by both Gossetts against the victim and her siblings without objection or any limiting instruction. RP 215:12-216:5. RP 276:9-278:10; RP 279:12-281:1; RP 283:19-284:16; RP 315:9-316:8. Additionally, Linda Gossett was portrayed as a very controlling person. RP 223:6-23; RP 245:18-25. Defense counsel even asked Mr. Gossett about an affair, which was then used by the prosecutor to attack his credibility during closing arguments. RP 782:18-783:18; RP 1449:1-19.

While the prosecutor argued for the admission of the evidence to explain the delayed disclosures and rebut assertions that Mr. Gossett was a peaceful man [RP 59-61], the victim testified that the reason she disclosed was because she was tired about how she was treated by the church members. RP 308:2-11. Ultimately, the prosecutor never did argue that anything related to a delayed disclosure or anything else related to the stated reason for its admission. RP 1419:17–1457:17. Nor did Mr. Gossett testify that he was a peaceful man. Nor did the defense even bring it up during closing arguments as a basis for questioning the credibility of the victim. RP 1458:4–1510:25.

During closing arguments to the jury, the prosecutor continually engaged in prosecutorial misconduct, from arguing a conviction based on propensity, to using defamatory comments directed at Mr. Gossett, his wife, and the church that they attended. All of which had nothing to do with the elements of the offenses, but was merely designed, in a “scorched earth” argument, to appeal to the passions and prejudices of the jury.

Specifically, at various points she argued, in attacking Linda and Mark

Gossett's credibility:

What do we know about the Gossetts? They beat the hell out of Tristen for missing a word. He was locked in a car, beaten with a wooden spoon, beaten with a belt, beaten with a piece of scrap wood, for God's sake. He was removed from the house because he was beaten by his family, and particularly this defendant, and he's convicted for it.

RP 1425:4-10.

They're vindictive people, folks.

RP 1439:13-15.

... it's hell living with the Gossetts.

RP 1442:1-3.

Her relationship with the abuser, her relationship with Mark Gossett, is such that on the physical abuse scale, Linda is much more heinous, much more brutal with the kids on a regular basis right? We know that. We know that by Linda's testimony, by Alisha's, even Sam. We know that Linda is beating everybody, especially Tristen, especially Alisha. Those are the bad kids, right? They're the ones getting the brunt of it.

RP 1445:12-23.

And what does the affair tell you about his Personality? It tells you a lot of stuff about him. Number one, he's got very poor sexual boundaries right? Very poor judgment. Okay. Number two, he's willing to violate the trust of the family member, his wife. All right. Number three, his needs are not being met by his wife, because he's seeking sex from some other source. And, in this case, we know by his own admission it's outside of the marriage, right? But we also know from Alisha that he's getting it from her as well.

And what else do we know? Well, he's willing to violate the trust of his beloved church, the covenants of his church. He's willing to violate that. He has no problem violating the trust of anybody. The kids that he beats, the child he molests, the

church he's supposed to express faith and covenants of and the trust of his wife, he has no problem violating all of that.

RP 1449:1-19.

"Did you hear from any of their little churchy friends that came up and testified for them..."

RP 1450:16-17.

And then what is the response of the non-offending person? That's mommy dearest, Linda Gossett. What's her response? Well, Alisha was so afraid that Linda was going to find out, because she thought she would be beaten even worse. Right? ...

And by the way, the heavy-iron-fisted Linda Gossett is going to do it.

RP 1446:24-1447:7.

And the beauty of having a group conform through oppression is that you only need to make an example out of one person. That's what the army does, right? You punish one for the whole group, they get to see what happens to that one. Well, that's what the Gossetts did. They beat on Tristen. They beat on Alisha. All the other kids conformed because they knew.

RP 1447:15-22.

And what do we know about Linda? She expects perfection. She's a domineering, controlling, very abusive and brutal parent....Do you think all of them were going to be wanting to play the violin? You know, Guitar Hero is a hit, but violin hero is even better, right? No. No. Violin was the chosen instrument. ...

What about Alisha? Everybody is magically involved in the Thurston County Youth Football League.... We know that they're all kind of glommed like this little Brady Bunch at each little place. There's no individuality. There's no individuality. There's no choices anywhere. Do you notice that about that whole family?

Linda expects complete obedience as well...She's also overwhelmed by the fact she has to take care of everything. She's pissed off at her husband...

RP 1453:2–1454:8.

In addition to these arguments, the prosecutor essentially argued that Mr. Gossett should be convicted because of propensity based on other bad acts, all of which was admitted without objection by defense counsel. For example, the prosecutor continually argued all of the “corporal punishment” suffered by all of the children at the hands of Linda Gossett supported a finding against Mr. Gossett. RP 1423:10-1425:18; RP 1431:13-15; RP 1441:19-1442:13; RP 1445:19-23; RP 1454:14-19. The justification for the argument apparently was, as argued by the prosecutor:

What do we know about the Gossetts? It's way more than that. Their version of little tap leaves bruises. We know that. And they have this signature about them, the Gossett signature. And it's not that they did it in the past, they're going to do it again. But what do we have? We have a great example from Tristen. You know, years later, in 2007, leopards don't change their spots, folks. They carry on until they're forced to change, right?

RP 1424:19–1425:4.

What do we know about the Gossetts in general? Well, past behavior is the best predictor of future behavior.

RP 1439:16-18.

It is one thing to cause pain and suffering of a child, but then to hinder them on top of that from getting help, to getting a better family, to recovering from their abuse, that's another. And that's what the Gossetts are all about. They're all about making their kids pay. And they did the same thing to Alisa.

That's their signature, folks. They like to make their kids pay.

RP 1440:11-23.

The prosecutor went so far as to argue that all of Mr. Gossett's conduct "violated the trust of his beloved church, the covenants of his church. He's willing to violate that." RP 1449:12-19. This included the physical abuse to the kids, and the affair that was admitted into evidence.

As previously mentioned, at no time did counsel object. Furthermore, in his own closing, with the exception that he commented that eighty percent of the State's argument centered on these other instances of conduct, "...to make Mark look bad", there was no further mention of it throughout his closing argument. RP 1461:1-1462:11.

## II. ARGUMENT

Generally, to prevail in a Personal Restraint Petition, a petitioner must demonstrate that he was actually and substantially prejudiced by a violation of his constitutional rights or by a fundamental error of law, resulting in a complete miscarriage of justice. In the Matter of the Personal Restraint of Pirtle, 136 Wn. 2d 467, 472, 965 P. 2d 593 (1998). However, when the claim is based on ineffective assistance of counsel, this heightened standard of prejudice is not required. The petitioner merely needs to show prejudice consistent with the standard set forth in Strickland, infra. See In the Matter of the Personal Restraint of Monschke, 160 Wn.App. 479, 490-91, 251 P.3d 884 (2010). Under the Strickland standard, prejudice is demonstrated when the petitioner demonstrates that there is a reasonable probability that, except for counsel's unprofessional

errors, the result of the trial would have been different. In the Matter of the Personal Restraint of Crace, 174 Wn.2d 835, 280 P.3d 1102 (2012).

Here, Mr. Gossett's petition meets both standards. Thus, the court should grant the petition and remand for a new trial.

**A. THE PROSECUTOR COMMITTED NUMEROUS INSTANCES OF MISCONDUCT DURING CLOSING ARGUMENTS THAT WERE DESIGNED TO APPEAL TO THE PASSION AND PREJUDICE OF THE JURY AND ARGUED FOR A CONVICTION BASED ON EVIDENCE ADMITTED UNDER ER 404 (B) BECAUSE IT DEMONSTRATED PROPENSITY TO COMMIT THE ACTS FOR WHICH HE WAS CHARGED.**

An individual's right to a fair trial is a fundamental liberty interest secured by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art.1 § 3 and Art. I § 22 of the Washington Constitution. Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed. 2d 618 (1987); In the Matter of the Personal Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). At a minimum, it "...implies a trial in which the attorney representing the state does not throw the prestige of his public office...and the expression of his own belief of guilt into the scales against the accused." 175 Wn.2d at 704 (citations omitted). It is violated when the prosecutor uses arguments designed to inflame the passions or prejudices of the jury. Id.

The burden is on the defendant to demonstrate that in the context of the entire trial, the conduct was improper and prejudicial, which requires a showing that there was a substantial likelihood that the misconduct affected the jury. Id. In the federal courts, the issue is whether the misconduct "so infected the trial with

unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168,181, 106 S.Ct. 2464, 91 L.Ed. 2d 144 (1986). Because Mr. Gossett’s trial counsel did not object at trial, he must establish that the misconduct “was so flagrant and ill-intentioned that an instruction would not have cured the prejudice.” Id.

That is precisely the situation present here. The prosecutor essentially engaged in a “scorched earth” attack, leaving no prejudicial argument unaddressed. Throughout the argument she referred to Mr. Gossett, his wife and his witnesses as “little churchy friends” in a less than flattering manner, notwithstanding the fact that arguments based on stereotypes are antithetical to and impermissible in a fair and impartial trial under the due (see United States v. Cabrera 222 F. 3d 590, 594 (9<sup>th</sup> Cir. 2000); State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011)) ; Linda Gossett as “mommy dearest”, heinous and brutal, domineering, controlling and “iron fisted”; both Gossetts as vindictive; and argued that all of the behavior the two engaged in created an oppressive environment similar to that existing in the army. She even argued that Mr. Gossett was guilty of the charged crimes because his affair demonstrated very poor “sexual boundaries” and that his sexual needs were not being met by his wife, so he was getting it from other sources, including the victim in this case. RP 1449:1-19.

Importantly, these were not minor instances of improper argument—they are simply examples of the pervasive theme used by the prosecutor throughout the closing argument that was designed to appeal to the passions and prejudices of the

jury and to allow her to conclude (improperly) that the jury should convict Mr. Gossett of the charges because the Gossetts “... past behavior is the best predictor of future behavior” (RP 1439:16-18), it was his signature (RP 1424 1440) and “leopards don’t change their spots” (RP 1424:19–1425:4).

As was the case in Glasmann, “...the misconduct was so pervasive that it could not have been cured by an instruction. Id. at 707 (*citing State v. Walker*, 164 Wn.App. 724, 737, 265 P.3d 191 (2011)). If there was ever an example of misconduct that was even more pervasive, flagrant and ill-intentioned than an instruction would not have cured the prejudice, it is here. In addition to deliberately appealing to the passion and prejudice of the jury, the argument appealed to religious prejudice, which violates the Fifth Amendment right to a fair trial. Cabrera, *supra*; Monday, *supra*.

Moreover, the misconduct extended beyond the above characterizations of Mr. Gossett, his wife, and their friends. The misconduct also included improper use of ER 404(b) and 608 evidence. In State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009), the Washington Supreme Court reversed defendant’s conviction when the prosecutor argued that the evidence of physical abuse against the victim and her siblings demonstrated the defendant’s propensity to commit sexual abuse.

In reversing the conviction the Court held:

...there is a substantial likelihood that the prosecuting attorney’s misconduct affected the jury, thus meriting Fisher a new trial. Even though defense counsel never made an issue of [the victim’s] delay in reporting, the prosecuting attorney preemptively presented the physical abuse evidence and argued that it demonstrated Fisher’s propensity to commit abuse. The jury, therefore, was left with the wrong impression that it must convict Fisher to obtain justice for

the harm caused to Brett, Brittany, Ashland, and Shelby, in addition to [the victim].

165 Wn.2d at 749.

Fisher is remarkably similar to this case. Evidence of prior physical abuse against the victim and her siblings was admitted into evidence. Defense counsel never made an issue of the victim's delayed reporting. Nor did he object to the introduction of the evidence or request a limiting instruction. The prosecutor argued that it demonstrated Mr. Gossett's propensity to commit the crimes when she argued, "...past behavior is the best predictor of future behavior", an argument that is precluded by ER 404(b). She also argued that the prior acts indicated a "signature" on the part of Mr. Gossett, he has very poor sexual boundaries, and "leopards don't change their spots".

This propensity argument even included a suggestion that because Mr. Gossett had an affair, it somehow meant that he knew no sexual boundaries, implying that he was, therefore, capable of committing the crimes for which he was charged and that the acts meant "that he was going to do it again". At no time did trial counsel object, even though this evidence cannot be used to demonstrate propensity. See State v. Fuller, 169 Wn.App. 797, 829, 282 P.3d 126 (2012)("[e]vidence of a defendant's past crimes or bad acts is not admissible to show that the defendant likely committed the crime charged, that the defendant acted in conformity with prior bad acts, or that the defendant had a propensity to commit the crime.")).

In determining prejudice, it is important to begin with the fact that this case turned on the credibility of the witnesses. There was no forensic evidence or

eye witness accounts. Under these circumstances the courts have consistently held that the cumulative effect of such misconduct warrants reversal of the convictions. See Fisher, supra; State v. Walker, 164 Wn.App. 724, 265 P.3d 191 (2011); State v. Venegas, 155 Wn.App. 507, 228 P.3d 813 (2010); State v. Johnson, 158 Wn.App. 677, 243 P.3d 936 (2010). The same analysis should apply here. Thus, this court should hold, consistent with all of the above cases, that there is a substantial likelihood that the prosecuting attorney's misconduct affected the jury deliberations causing prejudice to Mr. Gossett warranting a new trial and grant the petition.

**B. MR. GOSSETT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.**

The Sixth Amendment entitles a defendant to the "effective" assistance of counsel acting on his or her behalf. In analyzing an ineffective assistance of counsel claim, the Court considers the entire record and determines whether counsel's performance was deficient and whether the deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). While courts presume that defense counsel's performance was effective, this presumption will not stand muster when the performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). If petitioner meets this standard, he has demonstrated actual and substantial prejudice. Strickland, at 696.

The ultimate concern is with “the fundamental fairness of the proceeding whose result is being challenged” and whether “the result of the proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results”. Strickland at 696. The appropriate remedy for a trial conducted with the ineffective assistance of counsel is for the case to be remanded for a new trial with new counsel. Tower v. Glover, 467 U.S. 914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984); State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980).

The record here demonstrates a complete breakdown in the adversarial process, which ultimately has led to an unreliable result. For example, Mr. Gossett did not receive effective representation in several different ways. They are as follows:

1. Counsel did not object to the admission of 404(b) evidence, nor require the court to follow the procedures required for its admission,
2. Counsel did not object to the admission of ER 608 evidence that was admitted against Linda Gossett, nor require the court to follow the procedures required for its admission,
3. Counsel did not object to the many instances of prosecutorial misconduct that occurred during closing arguments,

All of these failures standing alone and/or cumulatively denied Mr. Gossett the effective assistance of trial counsel to which he is entitled.

i. Failure to object to 404(b) evidence.

When an ineffective assistance claim is based on counsel’s failure to challenge the admission of evidence, the defendant is required to show (1) an

absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection challenging the admission of the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

There can be no plausible strategic or tactical reason not to object to the introduction of evidence regarding the physical abuse of either the victim in this case or her siblings. Counsel even went so far as to question Mr. Gossett about an affair he had, which was then used by the prosecutor to attack his credibility during closing arguments. Not once did counsel object to the admission of any of this evidence, nor request that the court conduct a balancing test prior to its admission as required by ER 404(b). See Fisher, supra; State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). Had he objected and/or requested a balancing test, it is likely that the objection would have been sustained, or at a minimum, it would have been admitted for a very limited purpose. Id. While failing to request a limiting instruction may typically be considered a legitimate trial strategy (see State v. Humphries, 170 Wn.App. 777, 285 P.3d 917 (2012)) that is far different than not having any limitations placed on the basis for its admission, which in this case, had nothing to do with proving a delayed reporting. Certainly, it would not have been admissible to show propensity, which is precisely how the evidence was used by the prosecuting attorney during closing arguments.

Indeed, trial counsel acknowledged as much, when addressing the 404(b) evidence, he stated in closing that the State was simply trying "...to make Mark

look bad.” RP 1461:1-1462:11. However, that is precisely why counsel should have objected to its admission, requested a limiting instruction, and/or objected to the State’s closing argument. Without any limitation, the prosecutor was simply left to her own discretion as to how far she would go in seeking a conviction on propensity and appealing to the passion and prejudice of the jury—discretion of which was not even contemplated as a limitation during her closing argument. Doing none of the above amounts to a denial of effective assistance of counsel under the United States and Washington constitutions.

(ii) Failure to object to ER 608 evidence.

ER 608(b) provides as follows:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime...may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.

In this case, the prosecution elicited questions from the victim, as well as others, regarding Linda Gossett’s parenting skills, specifically attacking her use of discipline. This was then used as a personal attack upon her during closing arguments in an apparent attempt to attack her credibility. However, none of the information had absolutely anything to do with her character for truthfulness or untruthfulness. There simply was no legitimate trial strategy to stipulate to its admissibility. Thus it is likely, had there been no stipulation, that an objection to the admission of the evidence would have been sustained.

(iii) Failure to object to prosecutorial misconduct during closing argument.

As set forth above, the prosecutor's closing argument was permeated with statements that were designed to appeal to the passions and prejudices of the jury and suggest that Mr. Gossett should be convicted based on his past behavior and that of his wife. All of this was improper. Yet, not a single objection was made. As such, Mr. Gossett's right to effective assistance of counsel was violated.

In sum, none of the above deficiencies can conceivably be considered "legitimate trial strategy". See State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). As such, the court should accept the petition. Because the case was based on credibility and nothing else, Mr. Gossett has demonstrated that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the trial would have been different. See e.g. Fisher, supra; Walker, supra; Venegas, supra; Johnson, supra.

**C. THE COURT SHOULD CONSIDER THE INEFFECTIVE ASSISTANCE AND PROSECUTORIAL MISCONDUCT CLAIMS NOTWITHSTANDING THAT APPELLATE COUNSEL MINIMALLY ADDRESSED THEM ON DIRECT APPEAL.**

To the extent that the court believes that these issues were addressed on direct review, the other issue for the court's consideration of this ground for relief is whether Mr. Gossett should be precluded from presenting it in the petition because appellate counsel presented the general issue on direct appeal. Petitioner concedes that typically grounds that were already addressed on direct appeal cannot be resurrected via a Personal Restraint Petition. See In re Personal

Restraint of Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994). A “ground” is defined as a distinct legal basis for granting relief. In the Matter of the Personal Restraint of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986)(overruled on other grounds in In re Pers. Restraint of Nichols, 171 Wn.2d 370, 256 P.3d 1131 (2011)). To be “heard and determined”, it must be shown that:

(1)[T]he same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

In re Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984).

Because the ends of justice require the issue be reexamined, then it may be relitigated. Pirtle, 136 Wn.2d at 473. The Washington Supreme Court has adopted the United States Supreme Court’s discussion of the term:

Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. If factual issues are involved, the applicant is entitled to a new hearing upon a showing that the evidentiary hearing on the prior application was not full and fair; ...If purely legal questions are involved the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. Two further points should be noted. First, the foregoing enumeration is not intended to be exhaustive; the test is “the ends of justice” and it cannot be too finely particularized. Second, the burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.

105 Wn.2d at 688 (*quoting Sanders v. United States*, 373 U.S. 1, 16-17, 10 L.Ed.2d 148, 83 S.Ct. 1068 (1963)).

Here, Mr. Gossett's appointed attorney on appeal completely ignored the issues on appeal, restricting his argument on the prosecutorial misconduct argument to a single statement made by the prosecutor in closing argument:

Ladies and gentlemen, there's a lot of components to this whole trial. And what it comes down to are the elements. The elements of nine and ten, the to-convicts. It comes down to whether or not you really believe (A.R.G.)...

Appellant's Opening Brief at 7. RP 1456.

Likewise, the entire ground on direct appeal relating to the ineffective assistance claim was based on trial counsel's failure to object to this statement. Appellant's Opening Brief at 9-11.

As mentioned below this was wholly insufficient and amounted to ineffective assistance of appellate counsel, as it ignored the entirety of the prosecutor's argument, as well as the evidentiary record relating to trial counsel's decision to stipulate to inadmissible evidence.

The closing argument was designed solely to appeal to the passion and prejudice of the jury. Additionally it relied on propensity evidence that should never have been admitted in the first place. Both arguments are improper as previously decided by the cases set forth above. Moreover, trial counsel stipulated to the admission of evidence, both 404(b) and 608, that should have never been admitted. The law, as set out above, overwhelmingly supports this conclusion. Thus, there was no strategic reason to stipulate to its admission. Under these

circumstances, the ends of justice require that the court allow relitigation of the issues.

Thus the court should hear these grounds for relief because Mr. Gossett has demonstrated that, except for the unprofessional errors, the result of the trial would have been different. Under either a direct review standard or the heightened standard applied to collateral attack, the petition should be granted.

**D. MR. GOSSETT WAS DENIED HIS UNITED STATES AND WASHINGTON CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

One's right to effective assistance of counsel under the Sixth Amendment and Const. Art. I § 22 is not restricted to trial counsel. It also applies to appellate counsel's failure to raise a legal issue on appeal. See In the Matter of the Personal Restraint of Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997).

In order to prevail on an appellate ineffective assistance claim, petitioner is required to demonstrate that the legal issue which counsel failed to raise had merit and that he suffered actual prejudice based on the failure to either raise the issue or "adequately raise the issue". 133 Wn.2d at 344. As set forth above, It is Petitioner's position that the grounds of ineffective assistance of trial counsel and prosecutorial misconduct brought on direct appeal were not adequately raised on direct appeal and he has suffered actual prejudice as a result.

In representing Mr. Gossett, appellate counsel's duty includes a duty to research the law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)(citing Strickland, 466 U.S. at 690-91)). As set forth above, the courts have consistently

addressed conduct that is at issue in this case and consistently reversed convictions based on identical misconduct and ineffective assistance claims.

There can be no doubt that the prosecutor committed numerous instances of misconduct during closing arguments. In spite of the obvious misconduct, appellate counsel restricted his argument to a single one line statement that consisted of over 38 transcribed pages of argument, replete with misconduct.

Additionally, he completely ignored the 404(b) and 608 evidence that was both admitted and then misused during closing argument by the prosecutor without any objection by trial counsel, rendering his performance ineffective as consistently held by the cases cited above. Under these circumstances it can hardly be said that the grounds for appeal were adequately addressed by appellate counsel.

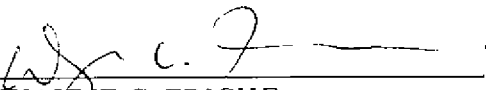
Because the arguments have merit and the failure to address them sufficiently prevented Mr. Gossett from receiving a new trial, he has established prejudice. The petition should be granted.

### III. CONCLUSION

For the reasons cited above and the authority referenced herein, the court should grant the relief requested.

Respectfully submitted this 11 day of April, 2013.

HESTER LAW GROUP, INC., P.S.  
Attorneys for Petitioner

  
\_\_\_\_\_  
WAYNE C. FRICKE  
WSB #16550

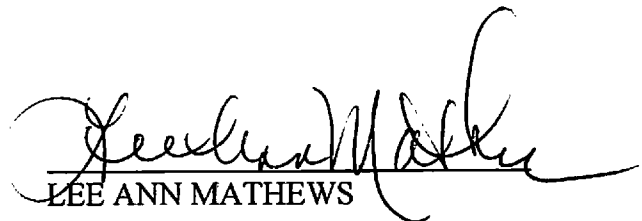
## CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the personal restraint petition brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Thurston County Prosecuting Attorney's Office  
2000 Lakeridge Drive SW., Building 2  
Olympia, WA 98502

Mark J. Gossett  
DOC #317246  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

Signed at Tacoma, Washington, this 11<sup>th</sup> day of April, 2013.

  
LEE ANN MATHEWS

# HESTER LAW OFFICES

**April 11, 2013 - 4:35 PM**

## Transmittal Letter

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Sender Name: Leeann Mathews - Email: [leeann@hesterlawgroup.com](mailto:leeann@hesterlawgroup.com)